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No. 73-701

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
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WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 7–15) is reported at 480 F. 2d 52. The decision and order of the Board (Pet. App. C, pp. 17–60) are reported at 199 NLRB No. 50.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 16) was entered on July 2, 1973. On September 13, 1973, Mr. Justice White extended the Board's time for filing a petition for a writ of certiorari to and including October 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

524-726—73——1

QUESTION PRESENTED

Whether a "managerial employee" is covered by the National Labor Relations Act unless her duties are such that there is likely to be a conflict of interest between her job responsibilities and her responsibilities to a labor organization.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. Sec. 151, *et seq.*) are as follows:

> SEC. 2. When used in this Act—
>
> * * * * *
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
>
> * * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

The Board found that editorial writers Dorothy Wood and Theodore Blankenship had no management role and that thus they were properly included in the same bargaining unit with respondent Company's news employees (Pet. App. C, p. 21).[1] The Board further found, *inter alia*, that the Company violated Section 8(a) (1) and (3) of the Act by transferring Wood, against her will, from the editorial page department to the Sunday magazine department, because of her union activities (Pet. App. C, p. 55). The Board ordered the Company, *inter alia*, to reinstate Wood to her former job, with back pay (Pet. App. C, p. 57).

[1] The Company's editorial page department consists of three people: Pearson, the editor of the editorial page, and writers Wood and Blankenship. Pearson reported directly to Colburn, the editor and publisher, and no editorial was published without prior clearance by Colburn. Wood and Blankenship did not participate in employer-employee relations, or in management decisions involving profit and loss, capitalization, or other entrepreneurial matters. Management policy or views that were expressed in editorials were determined by Colburn, and ultimately, by the owners of the newspaper. (Pet. App. C, pp. 23–24.)

The court of appeals held, contrary to the Board, that Wood and Blankenship "were so closely aligned with the newspaper's management in the formulation, determination, and effectuation * * * of the newspaper management's policies through its editorials as to be properly excluded from the collective bargaining unit of news department employees" (Pet. App. A, p. 14). It followed, in the court's view, that they were not "employees" under the National Labor Relations Act, and therefore the Company's action in transferring Wood did not violate the Act (Pet. App. A, pp. 11, 14).

REASON FOR GRANTING THE WRIT

The issue in this case is the same as one of those in *National Labor Relations Board* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72–1598, certiorari granted, October 9, 1973: Whether, as the Board contends, "managerial employees" are covered by the Act unless their duties are such that there is likely to be a conflict of interest between their job responsibilities and their responsibilities to a labor organization. The court below in this case did not inquire whether Wood's management functions were likely to conflict with her union responsibilities. Instead, it based its conclusion that she was not an "employee" simply upon its ruling that she was sufficiently identified with management to warrant excluding her from the bargaining unit of news employees.

Accordingly, if this Court in *Bell* upholds the Board's position, this case should be remanded so that

Wood's status may be reconsidered under the proper standard.

CONCLUSION

The petition for a writ of certiorari should be granted. We suggest, however, that the Court defer acting on the petition until it decides *Bell*, and then dispose of it in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

OCTOBER 1973.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 72-1673—May 1973 Term

WICHITA EAGLE & BEACON PUBLISHING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of National Labor Relations Board

Gerrit H. Wormhoudt, Wichita, Kansas (*Paul R. Kitch* and *J. Eric Engstrom*, Wichita, Kansas, with him on the Brief), for Petitioner.

Corinna Lothar Metcalf, Attorney, National Labor Relations Board (*Peter G. Nash*, General Counsel, *Patrick Hardin*, Associate General Counsel, *Marcel* Mallet-Prevost, Assistant General Counsel, and *Leonard M. Wagman*, Attorney, National Labor Relations Board, with her on the Brief), for Respondent.

Before PHILLIPS, SETH and HOLLOWAY, *Circuit Judges.*

SETH, *Circuit Judge.*

Wichita Eagle & Beacon Publishing Co., Inc. petitions this court, pursuant to 29 U.S.C. § 160(f), to review and set aside an order of the National Labor Relations Board (199 NLRB No. 50). The Board cross-petitions for enforcement of its order.

The Board has found that the newspaper had engaged in unfair labor practices within the meaning of sections 8(a) (1) and (3) of the Act, by transferring

employee Dorothy Wood, against her will, from the editorial page department to the Sunday magazine department because of the said Wood's union activities, and by telling employee Wood that consequences of her union membership and activity might be severe.

The record shows that the newspaper is engaged in the publishing, sale, and distribution of daily newspapers in Wichita, Kansas. In August 1970, the Wichita Newspaper Guild, affiliated with The Newspaper Guild, AFL–CIO, filed a petition with the Board seeking certification as the collective bargaining agent of the newspaper's employees. The Board conducted a hearing on the petition and issued a Decision and Direction of Election. In connection therewith, the Board found that two "editorial writers," Dorothy Wood and Theodore Blankenship, should be included in the bargaining unit as they did not "possess indicia of managerial employees."

The newspaper filed a request for review of the Decision and Direction of Election with the Board, limited to the inclusion of the two editorial employees in the bargaining unit, but the Board denied the request for review.

An election was conducted by the Board among the unit that it had determined was appropriate and the Union was certified as the collective bargaining agent for the bargaining unit. Contract negotiations between the newspaper and the Union were begun, and at the time of the hearing of the unfair labor practice complaint the parties had not reached a contract.

As to Mrs. Wood, the Union filed charges and a hearing was held before a trial examiner. The trial examiner found that the newspaper had violated sections 8(a) (1) and (3) of the Act by transferring Mrs. Wood from the editorial page department to the Sunday magazine department because of her union

activities. He recommended that she be reinstated in the editorial page department and that she be awarded any back pay that she would have been entitled to, including increases in salary, but for her transfer. The newspaper filed exceptions to the trial examiner's Decision. The Board issued its Decision and Order, adopting the trial examiner's Decision and adopting his recommended Order.

Mrs. Wood's position prior to her transfer to the Sunday magazine department was that of an editorial writer. As the trial examiner's Decision states, the editorial page department of the newspaper consisted of three people. Charles Pearson, editor of the editorial page, was the acknowledged supervisor of the two employees in the editorial page department, Mrs. Wood and Mr. Blankenship. He was excluded from the collective bargaining unit at the representation hearing by the Board. In the words of the trial examiner, John H. Colburn, editor and publisher of the newspaper, was also part of the editorial page department "in a real but perhaps ex officio sense." The trial examiner's Decision includes this description of the relationship of the positions:

> Normal day to day procedure, in the editorial page department, was the holding of a mid-morning conference, with Colburn, Pearson, Wood and Blankenship participating. In turn, at the conference, Pearson, Wood, and Blankenship would be asked what he or she had in mind for an editorial. Wood, for instance, when thus asked, might say that she had in mind writing a piece on ecology. Colburn or Pearson might say that we had an editorial on air and water pollution last week so we will not go on ecology again at this time. That would dispose of Wood's proposal. Or, for instance, Colburn might have responded to Wood's proposal in the following vein: What particular aspect of

ecology do you have in mind: Wood would respond, with some details and elaboration: the matter would then be discussed by those present; Colburn might then say to Wood, all right, give it a try. On some other subject thus raised, Colburn might make it clear that there were certain specific things that he wished to be stated in the particular proposed editorial, e.g., the theme of the editorial should be that, on balance, after weighing the arguments pro and con, the Government should proceed with the development of te supersonic transport plane because of the need to maintain leadership in the field of air transportation and because of the need to maintain a viable aerospace industry and the tens of thousands of jobs involved in that and in satellite industries. The editorial writer would follow such a directive.

Following the foregoing type of daily conference with Colburn, Pearson, Wood, and Blankenship would return to their offices. They would then get together in Pearson's office and discuss at greater length topics that had received tentative approval at the conference with Colburn. Views and possibly conflicting contentions would be exchanged and argued. In most instances it would be at this tripartite conference that definite editorial topics would be assigned by Pearson, to Wood, Blankenship or himself.

After a writer drafted or wrote an editorial, it was then submitted to Pearson. He might approve it, disapprove it, or prescribe changes or revision. If the editorial cleared Pearson, it would then go to Colburn. Again, the editorial might be approved, rejected, or rejected subject to some particular revision being made. Trial Examiner's Decision, Findings and Conclusions.

Whenever a particular member of the editorial department was assigned a topic which he or she felt

unable to write upon, either for reasons of personal conviction or otherwise, upon request the writer would be excused from the assignment. However, as the trial examiner found, ". . . every witness in this case, including Wood, agrees that the editorials of the newspaper function as the voice of [the newspaper's] ownership and management. What appears in an editorial is the subjective viewpoint of management." Trial Examiner's Decision, Findings and Conclusions.

Petitioner newspaper contends that editorial writers have the essential characteristics of managerial and confidential employees and therefore the two editorial writers in question, Mrs. Wood and Mr. Blankenship, were improperly included in the collective bargaining unit to begin with, and the newspaper's action in transferring Mrs. Wood was not properly subject to the Act's coverage. On the particular facts of this case, as brought out in the trial examiner's Decision and from an extensive reading of the record, we agree.

We recognize that the task of determining the application of the term "employee" ". . . has been assigned primarily to the agency created by Congress to administer the Act." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111; *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157. The courts, however, ". . . have never immunized Board judgments from judicial review in this respect." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.* The court said in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324 (8th Cir.):

> The term "managerial employee" is not used in the National Labor Relations Act, nor is provision made in the Act for the inclusion or exclusion of such employees in bargaining units. The Act is silent as to whether this type of employee is entitled to the protection of the Act

> for union activities or membership. The Board, however, has long followed the practice of excluding employees, designated as "managerial," from bargaining units in representation elections. It does so on the premise that certain non-supervisory employees are so closely allied with management that they should be excluded from employee bargaining units.

Although the Board considers editorial writers such as Mrs. Wood to be employees within the meaning of the Act, *A. S. Abell Co.*, 81 NLRB 82, 83 (1949), and there does seem to be some language in the case of *Associated Press* v. *NLRB*, 301 U.S. 103, which could support this position, a closer reading of the latter case in view of its facts leads us to another conclusion.

Associated Press dealt not with a person who was actively engaged in the "formulating, determining and effectuating" of the employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37 (7th Cir.); *Retail Clerks International Ass'n, AFL-CIO* v. *NLRB*, 366 F. 2d 642 (D.C. Cir.). Rather, that case dealt with a person who, although characterized as an "editor" or "editorial employee," was employed ". . . to determine the news value of items received and speedily and accurately to rewrite the copy delivered to [him], so that the rewritten matter [should] be delivered to the various filing editors . . . responsible for its transmission, if appropriate, to the areas reached by their circuits."

Regardless of which appellation is given to the employee in *Associated Press*, whether it be "editor," "editorial employee," or a member of the "news department," his position was much more akin to that of the employees in the news department of the petitioning Wichita Eagle & Beacon Publishing Co., Inc., in the instant case than to that of Mrs. Wood. The

hierarchy of personnel in Associated Press was such that the aggrieved employee was responsible, in turn, to a filing editor, various "editorial employees," "supervising editors," and an "executive news editor" in the "news department" of the Associated Press.

Although Mrs. Wood was responsible to the editorial page editor, Mr. Pearson, and in turn to the editor and publisher of the newspaper, Mr. Colburn, as concerns the content and direction of the newspaper's editorials, she nevertheless was an active participant in "formulating, determining and effectuating" the newspaper's journalistic policies. The daily conferences between Colburn, Pearson, Wood, and Blankenship attest to this relationship. While subject to supervision in her writing by the editorial page editor and the editor and publisher, Mrs. Wood could, and did, propose topics for editorials, propound her own viewpoint in an effort to influence editorial policy on various subjects, and was, in sum, an integral participant in the newspaper's subjective voice, its editorials. Whether termed a managerial employee, a confidential employee, or whatever, Mrs. Wood's relationship to the newspaper and its staff placed her in a position where she was intimately involved in "formulating, determining and effectuating" her employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37 (7th Cir.); *Westinghouse Electric Corp.* v. *NLRB*, 398 F.2d 669 (6th Cir.); *Retail Clerks International Ass'n, AFL–CIO* v. *NLRB*, 366 F.2d 642 (D.C. Cir.).

Mrs. Wood may not have been a "Chief" (in the words of the trial examiner), but she was certainly a member of the Chief's council in the formulation of editorials. We recognize that she had no formal hand in determining wages, hours, and working conditions for employees on the newspaper, nor did she par-

ticipate in such matters as basic ownership and management policies in the area of profit and loss and the like. Cf. *North Arkansas Electric Cooperative, Inc.*, 185 NLRB No. 83 (1970), 75 LRRM 1068–69. There is, however, a distinction between the reporting of news and the creation and expression of subjective opinion on behalf of a newspaper. To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper's management would come perilously close to infringing upon the newspaper's First Amendment guarantee of freedom of the press.

The business of the newspaper is not immune from the Act's coverage merely because it is an agency of the press. *Associated Press* v. *NLRB*. The newspaper is not contesting the Board's determination that its news department employees are a proper collective bargaining unit and come within the Act's protections. Although the Board's ruling in this case does not have any relation to the impartial distribution of news, per se, nor to the newspaper's ability and freedom to publish the news as it desires it published (*Associated Press* v. *NLRB*), it does infringe upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas.

We therefore reject the Board's determination that the two editorial writers, Mrs. Wood and Mr. Blankenship, were "employees" under the National Labor Relations Act. Rather, we hold that they were so closely aligned with the newspaper's management in the formulation, determination, and effectuation, not to mention expression, of the newspaper management's policies through its editorials as to be properly excluded from the collective bargaining unit of news department employees.

As the Supreme Court has noted:

> * * * [I]n the normal course of events Board orders in certification proceedings under § 9 (c) are not directly reviewable in the courts. This Court held as long ago as *American Federation of Labor* v. *Labor Board*, 308 U.S. 401, that the "final order[s]" made reviewable by §§ 10 (e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain * * *. In such a case, § 9 (d) of the Act makes full provision for judicial review of the underlying certification order by providing that "such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed" in the Court of Appeals.

Boire v. *Greyhound Corp.*, 376 U.S. 473. See also *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137. This is the situation in this case. The newspaper has duly filed objections to and requests for review of the collective bargaining unit determination at every step in this controversy. On the facts here present we find that the Board's Decision and Order are not supported by "substantial evidence on the record considered as a whole." National Labor Relations Act, § 10 (e), 29 U.S.C. § 160(e). Accordingly, the petition for review is granted, and the Decision and Order of the National Labor Relations Board, filed September 29, 1972, is vacated.

APPENDIX B

May Term—July 2, 1973

Before Honorable ORIE L. PHILLIPS, *Senior Circuit Judge,* Honorable OLIVER SETH and Honorable WILLIAM J. HOLLOWAY, Jr., *Circuit Judges.*

No. 72-1673

WICHITA EAGLE & BEACON PUBLISHING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

This cause came on to be heard on the petition for review of the decision and order of the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered that the petition for review is granted and the decision and order of the National Labor Relations Board, filed September 29, 1972, is vacated.

HOWARD K. PHILLIPS,
Clerk.

By: LAVON M. IRLBECK,
Deputy Clerk.

A true copy.
Teste:

HOWARD K. PHILLIPS,
Clerk, U.S. Court of Appeals, Tenth Circuit.

APPENDIX C

United States of America Before the National Labor Relations Board

Case 17—CA—4800

WICHITA EAGLE & BEACON PUBLISHING CO., INC.

and

WICHITA NEWSPAPER GUILD, AFFILIATED WITH THE NEWSPAPER GUILD, AFL–CIO

DECISION AND ORDER

On May 8, 1972, Trial Examiner Ramey Donovan issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Wichita Eagle Eagle & Beacon Pub-

524-726—73——3

lishing Co. Inc., Wichita, Kansas, its officers, agents successors and assigns the Trial Examiner's recommended Order.

Dated Washington, D.C.
[September 29, 1972]
[SEAL]

NATIONAL LABOR RELATIONS BOARD,
EDWARD B. MILLER, *Chairman.*
JOHN H. FANNING, *Member.*
JOHN A. PENELLO, *Member.*

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

WICHITA EAGLE & BEACON PUBLISHING CO. INC.

and

WICHITA NEWSPAPER GUILD, AFFILIATED WITH THE NEWSPAPER GUILD, AFL–CIO

Gerald A. Wacknov, Esq., for the General Counsel. *Jim Lawing, Esq.,* for the Charging Party. *Gerritt H. Wormhoudt, Esq.,* for the Respondent.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

RAMEY DONOVAN, *Trial Examiner:* A charge and an amended charge were filed on August 18, 1971 and on January 10, 1972, respectively, by Wichita Newspaper Guild, affiliated with The Newspaper Guild, AFL–CIO, herein the Union, against Wichita Eagle & Beacon Publishing Co., Inc., herein the Respondent, the Company, or the Employer. The complaint issued on January 11 1972, was amended at the instant hearing pursuant to a Notice of Intention To Amend. As amended, the complaint alleged threats of reprisal against employees because of Union membership and

activity and that Respondent had transferred employee Dorothy Wood from its editorial department to its Sunday magazine department because of her membership and actiivty in the Union, all in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act. Respondent in its answer has denied the commission of the alleged unfair labor practices. It has also, in its answer, invoked specified constitutional provisions and amendments to support its affirmative contention that Wood and other editorial writers are not "employees" within the meaning of the Act and that the National Labor Relations Board, herein the Board, has no jurisdiction "as to the employment relationship of such persons." The case was tried in Wichita, Kansas, on March 2–3, 1972.[1]

FINDINGS AND CONCLUSIONS

I. Jurisdiction

Respondent is engaged in the publishing, sale and distribution of daily newspapers and has its main office and principal place of business in Wichita, Kansas. In the course of its newspaper operations, Respondent has an annual gross volume of business in excess of $200,000. Respondent holds membership in, or subscribes to, interstate news services, publishes nationally syndicated features, and advertises nationally sold products.

At all times material, Respondent has been and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union has been and is, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[1] The General Counsel's motion to correct the transcript of testimony is unopposed and is granted, including p. 259, line 22, change "have waived" to "have not waived."

II. The Alleged Unfair Labor Practices

Background

Respondent employs approximately 667 full-time and 127 part-time employees. From Monday to Friday Respondent publishes the Wichita Eagle, a morning paper, and the Wichita Beacon, an evening paper. A combined edition, the Wichita Eagle & Beacon, is published on Saturday and on Sunday. There were approximately 143 persons employed in the news and editorial department. The Eagle employed 55 employees and the Beacon 36. Fifty-three employees were employed in sections that served both papers.

In the spring of 1970, the Union commenced organizational activities among Respondent's employees. A petition for certification was filed with the Board by the Union in August, 1970. Thereafter, in September, 1970, the Board conducted a hearing on the petition. All parties participated in the hearing. On November 30, 1970, the Board, through its Regional Director, issued a Decision and Direction of Election.

The aforementioned Decision found that the following was an appropriate bargaining unit:

> All employees of the news and editorial department of the Wichita Eagle & Beacon Publishing Co., Inc., in Wichita, Hutchinson, and Topeka, Kansas, excluding professional employees, guards and supervisors as defined in the Act, and excluding all other employees.

As disclosed in the Decision, the parties had stipulated in accordance with the record, and it was found, that the following positions within the news and editorial department would be excluded as supervisors, confidential secretaries, or as persons allied with management: (Eagle & Beacon) editor and publisher, executive editor, secretary to executive editor, state news

editor, associate editor of public affairs, editorial page editor, head librarian, chief photographer, and Women's editor; (Eagle) managing editor, night managing editor, city editor, executive sports editor, sports production editor; (Beacon) managing editor, secretary to managing editor, assistant managing editor, and sports editor.

In addition to the foregoing exclusions from the unit, the Board excluded, as supervisors, two assistant city editors (Eagle) as contended for by the Company. Contrary to the Company's position, the assistant chief photographer was found not to be a supervisor and was included in the unit. Although the women's editor was excluded as a supervisor, it was found on the evidence in the record that the women's news editor was not a supervisor and she was included in the unit. The Company had contended that two editorial writers, Dorothy Wood and Theodore Blankenship, were supervisors and should be excluded from the unit. The Board found, however, that the two editorial writers were not supervisors and that they did not possess the indicia of managerial employees. Their positions, therefore, were included in the unit.[2]

Following the aforedescribed Decision and Direction

---

[2] *Inter alia*, the Board Decision, is referring to the two editorial writers, stated:

"Record testimony reflects that neither Blankenship nor Wood possess any indicia of statutory supervisory authority. All three writers [Blankenship and Wood and Pearson, editor of the editorial page; Pearson was excluded from the unit in view of his supervisory status over Blankenship and Wood], including the editor, have individual offices, and are under the direct supervision of the editor and publisher [Colburn] and major stockholders of the Company, with respect to questions of editorial policy. There is nothing in the evidence to indicate that the—two editorial writers———, in any way, possess indicia of managerial employees . . ."

of Election, the Employer filed with the Board a request for review of the Decision and Direction of Election.[3] The request for review was limited to the matter of the inclusion in the unit of the two editorial employees. On about December 31, 1971, the Board denied the request for review on the ground that "it raises no substantial issues warranting review."

An election was conducted by the Board on January 6, 1971, in the unit that it had determined was appropriate. Thereafter, in January, 1971, the Union was certified as the collective-bargaining agent. The Company and the Union commenced contract negotiations in March, 1971. At the time of the instant hearing, agreement on a contract had not yet been achieved.

Dorothy Wood

Wood commenced work on the copy desk of the "old" Wichita Beacon in 1957. After about a year she became an assistant to the editor of the editorial page of that paper. When the Eagle purchased the Beacon in 1960, Wood was offered a position with the Eagle, the Beacon having been discontinued as such. She worked for the Eagle for several months as the education writer. In about December, 1960, Wood left the paper to become assistant editor of a magazine. She returned to the newspaper in October, 1963. The newspaper was then publishing as the Wichita Eagle & Beacon. At the time of her return Wood had been asked to work in the editorial page department. However, Colburn, editor and publisher, had then asked her, when she returned, if, instead of the foregoing editorial page work, she would be editor of the

[3] The Decision and Direction were by the Board's Regional Director acting pursuant to duly delegated authority of the Board. As provided, the Employer's request for review had been directed to the Board itself.

paper's Sunday's magazine. Wood held the latter position until about February, 1965. Apparently because of some change in the nature of the Sunday magazine, Wood decided that she did not wish to continue working in that section of the paper. She applied for and received a transfer to the editorial page department in February 1965.[4] Wood continued as a writer in the editorial page department until August 16, 1971, when she was involuntarily transferred to the position of editor of the Sunday magazine.

As the Board found in the representation case, previously described, and as the evidence in the instant case shows, the editorial page department of Respondent consists of three people. Pearson, editor of the editorial page, was an acknowledged supervisor of the two employees in the editorial page department, Wood and Blankenship. The two latter persons were writers in the editorial page department. In a real but perhaps ex officio sense, Colburn, editor and publisher, was also part of the editorial page department. Pearson reported directly to Colburn and no editorial, whether written by Pearson, Wood or Blankenship, was published without prior submission to, and clearance by, Colburn. Insofar as the two writers were concerned, editorials written by them were initially subject to Pearson's scrutiny, review, and clearance, and they were subject to his direction and supervision.

The foregoing organizational structure of the editorial page department discloses that the two writers, Wood and Blankenship, are Indians rather than Chiefs. The two management supervisors are quite clearly Colburn and Pearson. Wood and Blankenship

[4] Referring to the Sunday magazine, Wood, in her testimony stated that she thought "it was abominable and I didn't want to edit it any longer and I asked if I could go back to the job that I originally applied for and had been asked to apply for" [i.e., editorial page writer].

are the editorial page people who are supervised. They themselves possess no indicia of a supervisor as the term is defined in the Act, broad though the definition is.[5] The two writers supervise no one in their own department or in any other department.

In the relationship of the Employer (management) to its employees regarding wages, hours, and working conditions, the two writers have no management role nor any other role distinguishing them from other employees. The area of an employer's relationship to its employees regarding the latter's wages, hours, and working conditions is the crux and the ambit of the Act. Congress has recognized that those who represent and act for management in the employer-employee arena are management's agents and are not employees. They are excluded from alignment or inclusion with employees when the latter deal with management through a labor organization.

In addition to having no management role or participation in employer-employee relations, there is no evidence or contention that Wood or Blankenship were participants in or privy to basic ownership and management policies in the area of profit and loss, capitalization, stock issuance, stock distribution or ownership, acquisition or disposition of real or other property or expansion or contention of the enterprise, or related management policy. Management policy or views that were expressed in editorials were determined by Colburn, the editor and publisher, or perhaps, ultimately, by the owners of the newspapers.

We now examine the normal day to day operations and activities of the editorial page department and of its personnel, including certain of their outside activities and Respondent's rules relating thereto.

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[5] Sec. 2(11).

Although almost all descriptive terms are relative, we can appropriately describe the editorial page people as creative writers. They are craftsmen (and women) of the written word and they are professional writers. They deal with events and ideas in an intermeshed context. As individuals, they are aware of and participate as members of the community in world, national, and local affairs; they read and they ruminate; they discuss and confer, and they write.

Every witness in this case, including Wood, agrees that the editorials of the newspaper function as the voice of Respondent's ownership and management. What appears in an editorial is the subjective viewpoint of management. An editorial prepared by Wood or Blankenship must have the approval of Pearson and Colburn before it is published, with Colburn having the ultimate determination. Whether the personal views of an editorial writer coincide or differ, in whole or in part, from what management wishes to say in an editorial, the editorial is written to reflect management's views. Neither Wood nor anyone else has disputed the foregoing standard either in theory or in practice. In any event, as aforementioned, no editorial is approved or published without Colburn's and Pearson's clearance and approval.

Normal day to day procedure, in the editorial page department, was the holding of a mid-morning conference, with Colburn, Pearson, Wood and Blankenship participating. In turn, at the conference, Pearson, Wood, and Blankenship would be asked what he or she had in mind for an editorial. Wood, for instance, when thus asked, might say that she had in mind writing a piece on ecology. Colburn or Pearson might say that we had an editorial on air and water pollution last week so we will not go on ecology again at this time. That would dispose of Wood's proposal.

Or, for instance, Colburn might have responded to Wood's proposal in the following vein: what particular aspect of ecology do you have in mind; Wood would respond, with some details and elaboration; the matter would then be discussed by those present; Colburn might then say to Wood, all right, give it a try. On some other subject thus raised, Colburn might make it clear that there were certain specific things that he wished to be stated in the particular proposed editorial, e.g., the theme of the editorial should be that, on balance, after weighing the arguments pro and con, the Government should proceed with the development of the supersonic transport plane because of the need to maintain leadership in the field of air transportation and because of the need to maintain a viable aerospace industry and the tens of thousand of jobs involved in that and in satellite industries.[6] The editorial writer would follow such a directive.

Following the foregoing type of daily conference with Colburn, Pearson, Wood, and Blankenship would return to their offices.[7] They would then get together in Pearson's office and discuss at greater length topics that had received tentative approval at the conference with Colburn. Views and possibly conflicting contentions would be exchanged and argued. In most in-

[6] The Trial Examiner is, of course, stating a supposititious case in order to flesh out the clear import of testimony in the record describing the nature of the editorial page conferences with Colburn.

[7] The offices are on the third floor rear. The president or owner of the Company occupies an office in the extreme southeast corner. Pearson's office is north of the president's, separated by a reception room and the office of the president's secretary. The offices of the two editorial writers are next to Pearson's. From this area, and on the same floor, there are, in turn geographically, the library, the women's section, the sports department and then the newsroom.

stances it would be at this tripartite conference that definitive editorial topics would be assigned by Pearson, to Wood, Blankenship or himself.

After a writer drafted or wrote an editorial, it was then submitted to Pearson. He might approve it, disapprove it, or prescribe changes or revision. If the editorial cleared Pearson, it would then go to Colburn. Again, the editorial might be approved, rejected, or rejected subject to some particular revision being made.

Wood testified that in her more than 6 years as an editorial writer for Respondent there had been occasions when she or another writer, at one of the aforedescribed editorial conferences, might be assigned to a topic that was distinctly unpalatable to that particular writer or concerning which she believed she could not write with reasonably good conviction. In such situations, Wood or whoever else might find himself in a similar position, would ask to be excused from the assignment. Management would customarily honor such a request and would assign the topic to someone else. However, there is no contention or instance in this record where management, Colburn, or Pearson, told Wood that, despite your feelings, we want you to write this editorial and she refused to do so or, where, under such circumstances, she failed to perform with professional competence. As Wood credibly testified: if her request to be excused from a particular topic was not honored, she, "like any other employee [would have obeyed management's order]. I would have put it [the topic] into writing for them because, as he had said, that is our job to write out what management's view is." Confirmation that Wood performed her job as a professional writer in the manner that Respondent prescribed is admitted by both Colburn and Pearson. Colburn, for instance, was

asked if it was not a fact that Wood had "received her salary increases and you found no fault and always thought she was a good employee?" He replied: "Obviously, or we wouldn't have kept her on." This was true despite the fact that at times Colburn and Pearson state that, in their view, Wood became "emotional" about certain contentions or points of view. At various times Colburn had complimented Wood on a particular editorial that she had written.

In addition to writing editorials, the editorial page people each had a column that appeared on the editorial page. Unlike the editorials, the writers of the respective columns were identified. Thus, Wood had a column called, "Ladies Day" that appeared with her name and picture in the Wednesday night Beacon. The column was a personal opinion type of thing where Wood could write about subjects that interested her, e.g., a snow storm, a sermon she had heard, women's rights and so forth.[8] Generally, as contrasted with the editorials, the writers did not discuss their column ideas with Colburn or Pearson beforehand. However, carbon copies of the proposed column were submitted to Pearson prior to publication and he, in turn, would submit the carbon to Colburn. The column was not published without the approval of Pearson and Colburn.

To complete the foregoing picture of Wood as an editorial page employee of Respondent since February 1965, the type of subjects on which she customarily drafted editorials and her outside activities are relevant. She focused on urban topics and frequently wrote about schools and their problems.[9] Welfare and women's rights were also within her ken. Labor-Man-

[8] Pearson's column was entitled "Vagaries" and Blankenship's was called, "It's Not Serious."

[9] At one time Wood had taught school.

agement matters were not her topic. Indeed, according to Wood's uncontroverted testimony, labor-management was an infrequent topic on Respondent's editorial page.

Wood was, at all times during her employment, active in various groups and organizations. She was active in the National Conference of Christians and Jews; she was on the board of KPTS, a public television station; she was a member of Presswomen of the National Organization for Women; she had appeared publicly on television with the aforementioned Presswomen; she was a member of Fair (Forum to Assure Individual Rights), an organization concerned with the problems of welfare recipients; she was a church member; a member of the board of the Heart Association. Wood had made no secret of her many outside activities and frequently discussed matters with Pearson that had arisen at meetings of these organizations. She had neither sought nor received clearance from Respondent before joining or becoming active in these various outside organizations and had never been admonished regarding such activities.

Other persons working for Respondent also engaged in outside activities. A city editor and a reporter serve as precinct committeemen for political parties.[10] Colburn testified that Respondent had granted permission for the foregoing activity. In the last city election, both Pearson and Wood were active in the selection and support of some candidates for the city commission.[11] Colburn testified that during

[10] The record is not clear whether they are both precinct committeemen for the same political party (Democrat or Republican) or whether each is a committeeman for a different party.

[11] Wood and Pearson, as appears from the record, were good friends and apparently shared a number of common viewpoints.

some campaign Pearson had erected a sign in his yard for a named congressman. Colburn states that he had ordered Pearson to take down the sign but "it was not removed as far as I [Colburn] know."

There were also other outside activities of persons employed by Respondent that had been discontinued at Respondent's request. Colburn, apparently came with the paper in 1962 or 1963. At that time, Perry was editor of the editorial page. He was on the board of the Urban League. According to Pearson, Colburn gave Perry the choice the resigning from the board of the League or of severing his employment with Respondent. Perry resigned from the League's board. Colburn testified that when he joined Respondent's staff, Mac Martin was writing pieces "for politicians and specials and so on . . . he did it rather notoriously and he worked both sides of the fence politically." Also, Colburn states that he found that some sports writers "were writing for certain promoters." The foregoing activities ceased with Colburn's advent and the issuance of a handbook on Respondent's policies and rules.[12]

In April 1971, a publication or paper called the Central Standard Times appeared with a fairly long article headed:[13]

> "Newsmen Make Payola Pay—Subtle Blatant Bribes Exist On Every Paper in Country"

After a few introductory comments, e.g., "Newsmen are nothing without their scruples, their ethics and their independence. Based on that statement, many newsmen are nothing. 'Prostitution' it's called on a more base level: payola is the legal term . . ." and a

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[12] The relevant portions of the handbook are described, infra.

[13] From limited evidence in the instant record, the Central Standard Times was evidently an "underground press" type of publication.

quotation from a university professor, the balance of the article castigates, by name, Respondent's paper and various editors, writers, and departments thereof. Disproportionaate coverage by the paper of the local professional baseball team is ascribed to the executive editor's personal financial investment in the team and his baseball role in the Chamber of Commerce. Next, the executive sports editor is alleged to have received and to be receiving money from teams and sports organizations. The article then asserts that "a situation unique to Wichita is the relationship between the aerospace writer and the city's aircraft company managers." This theme is developed by mentioning perquisites allegedly received by the aerospace editor; it is stated that recently it was virtually impossible to have the newspaper's aerospace writer "gather facts for a story unpalatable" to the aircraft company management. Other departments and writers on the paper are similarly accused of venality or corruption, including "incredibly biased editorial accounts" regarding aspects of the prisoner of war issue in Vietnam.

Colburn, upon learning of the foregoing article in the Central Standard Times, wrote to each of the 7 Wichita Eagle and Beacon reporters because of their "connection with some of the material that appeared in the April edition of Central Standard Times. . . . [the] article infers through deceptive reporting and writing that corruption prevails in the newsroom . . . other inferences were made . . . that reflect a lack of professionalism and a disrespect for your employer [the Eagle and Beacon]." The letter cited provisions in Respondent's "Employee Handbook," regarding employee conduct. Colburn in the letter, then informed the 7 recipients that they had the choice to either disassociate themselves from the

Central Standard Times or to resign as employees of Respondent.

The "Employee Handbook," that employees of Respondent received, described the paper's history and the rules, benefits, and related matters that applied to employees. With respect to editorial policy, the handbook stated, *inter alia,*

> Label as editorial its [the paper's] own views or expressions of opinion . . . Stimulate and vigorously support public officials, private groups and individuals to increase the good works and eliminate the bad in the community.
>
> Serve as a constructive critic of government at all levels, providing leadership for necessary reforms or innovations . . .

Under "Publication Relations" the handbook declared,

> You, as an employee, represent the Company in your contacts with the public. Your conduct will have some effect on the image others have of the newspapers. For those who deal directly with the public in the course of their work . . . courtesy is required at all times. . . .
>
> Telephone requests for information should be handled politely . . .

The next heading in the handbook is "Outside Jobs." It is there stated:

> Under certain circumstances, a company employee may do limited outside work for pay if it does not interfere with his duties to the company or impair his efficiency. Such outside jobs must be approved by the department head in advance.
>
> Editorial and News Department employees are forbidden to serve as public relations writers for political candidates or parties, or any group seeking to influence news or editorial policy.

In the Examiner's opinion the above "Public Relations" rules deal with employee "conduct" vis-a-vis the public. That is, the employee should be polite, courteous and so forth since "your conduct will have some effect on the image other have of the newspapers" and, in that sense, the employee" "represent[s] the Company in [his or her] contacts with the public." The section does not purport to deal with what kind of outside job, work, affiliations or associations are permitted or proscribed. By the same token, the section on "Outside Jobs" is the guideline and the extent of the guideline on outside activities or affiliations by employees. The import of the caption, "Outside Jobs," is borne out by the text which speaks of "outside work for pay"; and the concern about such "outside work for pay" is in terms of impairment of efficiency or interference with the employee's performance of his duties with the papers. As to editorial and news department employees, who are subject to the general rules of the sections dealing with "Public Relations" and "Outside Jobs," there is an additional specific prohibition. They are not to serve "as public relations writer for political candidates or parties" nor are they to serve as public relations writers for "any group seeking to influence news or editorial policy."

Having seen the manner in which the editorial page department and its editors and writers operated, as well as their outside activities, and the rules of Respondent's Employee Handbook, we come to Wood's activities which are the crux of the instant case.

When the Union began organization activities among Respondent's employees in the spring of 1970, Wood signed a union card. She states that thereafter there was considerable talk or "whispering" going

around about which employees had signed cards and which had not.[14]

Wood and Pearson were good friends. Soon after Wood joined the Union she told Pearson of this fact at his home. Pearson "became very grave" at this intelligence but said it was Wood's choice and that he would do nothing to interfere with her choice. However, he said that he wanted to warn Wood as a friend "that consequences were likely to be real severe." Without describing the consequences, Pearson told Wood that the Company "would not like" the fact that she had signed a card and that she "should be prepared for any consequences."

As previously mentioned, the Union filed a petition for certification with the Board in August 1970. A hearing on the petition was held in September 1970, at which the Company, *inter alia*, opposed the inclusion of editorial writers in the unit. In November 1970, but evidently prior to the Decision and Direction of Election, dated November 30, 1971,[15] Wood told Pearson that she had been invited to attend a meeting in Chicago of women members of the Union. The meeting was to be held on Saturday and Sunday. Wood proposed to leave on Friday and work Monday of the following week instead of the Saturday of the meeting. In short, she proposed a "swap" or trade of days off.[16]

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[14] The other editorial writer, Blankenship, did not join the Union. Since Wood was aware of this fact, it is quite possible that others were aware, at least to some degree, of the union supporters and opponents. Blankenship testified that, personally, he was opposed to the Union and felt that as an editorial writer he "had the confidence of management" and that it was not proper for him to join the Union.

[15] It is probable that the parties did not receive the Decision and Direction until December 1, 1970.

[16] The Chicago meeting was evidently one called by the Union at the request of its female members who wished to discuss the problems of their sex as employees in the newspaper field.

Pearson said that he would ask Colburn. Pearson returned and said that, although Colburn was not at all pleased, Wood would be allowed to trade her day off. This was done and Wood attended the meeting.

The Board election was held on January 6, 1971. Wood was the union observer at the election.[17] Thereafter, in the same month, the Union was certified as the bargaining agent for the unit. The local union has a president, vice president, secretary and treasurer. They and 3 other union members comprise the executive committee or board. On January 23, 1971, Wood was elected as one of the non-officer members of the executive committee.

In January 1971, after the Union was certified, the four party (Colburn, Pearson, Wood, and Blankenship) editorial conferences were discontinued. There was no announcement or proclamation but the conferences were no longer held. The tri-party conferences of Pearson, Wood, and Blankenship continued to be held as before and Parson's daily contacts with Colburn continued. For a brief period Colburn and one or two other executives did not speak directly to Wood but this situation did not continue. Colburn did resume calling and speaking to Wood about this or that aspect of the work as had been the case previously. However, the four party conferences were never resumed while Wood continued as a writer in the editorial page department.

In the period after the editorial conferences with Colburn had been discontinued, Wood discussed the fact with Pearson on several occasions in January 1971. Pearson told her, "It is quite obvious that it

[17] At Board elections, in addition to the Board agent, each party, the employer and the Union, has an observer that each selects. The observer monitors the eligibility of voters and the conduct of the election.

is because the Company did not want you to be in the Guild [the Union] and Mr. Colburn does not want to have editorial conferences with us any longer. They made it a point that you are affiliated with the Guild." [18]

Preparatory to beginning contract negotiations with Respondent, the Union, in February 1971, elected members to its negotiating committee. Wood was one of those elected to serve on the committee.[19] She participated in negotiations thereafter.[20]

Colburn testified that in "late January or early February, [1971]" and "after the Guild won the [Board] bargaining election and Mrs. Wood became an officer of the Guild, I advised Mr. Pearson that Mrs. Wood should not be permitted to write any editorials regarding labor affairs." [21] Pearson substantially confirms Colburn on this aspect. Pearson informed Wood that Colburn had decided she was not to write any more editorials on labor matters. Wood asked Pearson the reason for this decision. Pearson replied that Colburn considered that, as a member of the Union and as a union negotiator, she was biased on labor matters and therefore should not write editorials on that subject. Wood protested that

[18] Wood was the only person in the editorial page department who was a member of the Union.

[19] Negotiations began in March 1971.

[20] Although Colburn was not one of the Company representatives in negotiations, he was in close contact with the Company representatives regarding various management proposals and bargaining positions.

[21] As we have seen, Wood became a member of the executive committee of the local union (the Guild) after the Union was certified. She then was also elected to be a member of the local union's negotiating committee. As the term is customarily used, she was not an officer of the Union although, in our view, this is not a determining factor one way or the other.

as a professional writer she could be fair and unbiased no matter what her affiliations. Pearson said he agreed with that and had so informed Colburn but the latter had adhered to his decision.[22]

Although Wood testified that she believed the above edict regarding her not writing on labor subjects occurred in May, 1971, the evidence persuades us that this occurred in late January or early February. However, there was an incident around May, 1971 that merits description.

From April into May 1971 the local public school teachers, represented by the NEA, and the Wichita board of education had been in negotiations regarding pay increases for teachers. The evidence reveals no strike or threat of strike. Apparently and predictably, the community would be and was concerned about the failure of the parties to resolve their differences in this important public sector.

In one of the intramural editorial conferences of the type previously described, Wood proposed writing an editorial on the above dispute.[23] She outlined the substance of the editorial she had in mind. Pearson told her to go ahead and prepare the editorial as outlined. Wood did so and submitted the editorial to Pearson. This was around the middle of May. Pearson read it and said that it looked all right to him. Pearson took the proposed editorial to Colburn. The next occur-

[22] Pearson testified that Wood was a good employee and a good editorial writer. He said that as far as he knew she had never written anything exploiting any prior activity that she was engaged in. Pearson also testified:

"I believe I expressed to Mr. Colburn that I had confidence in her competence and that I thought that she was a professional writer and that she could write on these subjects."

[23] Wood testified that she regarded the dispute as primarily a public school problem involving the whole community rather than as a labor-management confrontation.

rence was a call from Colburn to Wood. Colburn made it clear that he was not satisfied with the proposed editorial. Colburn said to Wood that she had not been thorough enough and that she should have talked to Darrell Kellogg.[24] While Wood testified that she personally did not think that contracting Kellogg was necessary, she did call him as suggested by Colburn.[25] Using some material furnished to her by Kellogg, she drafted a second editorial. The record does not show whether she had turned in this latter editorial or was still working on it when Respondent did publish an editorial on the school dispute.

The published editorial was written by Pearson. It was quite apparently written at Colburn's direction after his disapproval of Wood's proposed editorial. Since Pearson had approved Wood's editorial, it is fairly evident that, in addition to being directed to write a substitute editorial, Pearson had received some kind of instruction from Colburn as to the tenor or direction of the desired editorial.

It is no concern of the Trial Examiner what Respondent says or does not say in its editorial about the school dispute. Our involvement in the matter of these particular editorials is necessitated by Respondent's contention in its brief that Wood's inability to write without bias on labor-management is demonstrated by the episode of the school dispute. Thus, Respondent asserts that "the salient facts favorable to the school board" were not present in Wood's proposed editorial as contrasted to the published editorial.

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[24] Kellogg is not identified in the record but Respondent's brief indicates that Kellogg was a representative of the board of education, also referred to as the "school board."

[25] There is no claim or evidence that originally or later Wood had contacted a representative of the NEA before writing her proposed editorial.

Although Wood admits her sympathies lay with the teachers, her editorial was brief and said nothing about the merits of the issue in dispute or indicated a position on the merits.[26] The sole theme and import of the editorial was that "in the interest of the schools, the teachers and the public, it looks like the time has come to ask for mediation in the teacher contract negotiations."[27] Elsewhere, the editorial stated:

> Apparently the main difficulties came in interpretation of facts, particularly whether there is money available for salary increases on the scale asked by the teachers. NEA-Wichita has figures showing the board has money on hand; the board contends that it doesn't. Obviously, some outside person or persons is needed to assess the facts.

The editorial published by Respondent also endorsed and had the theme of mediation. In fact, as published, the caption was "Why Not Mediation." The editorial stated:

> The big dispute at the moment is over how much money is really available for teacher salary increases. The board uses one set of figures, the teachers another.

The editorial said that the board had done a better job in explaining its figures than the NEA. It was then stated that the board had a budget of a named figure; the board had allocated increases it deemed necessary to transportation, food service, equipment, administrators, etc., and, if the raises asked by the teachers were given, this would be a named figure over the budget total; budget increases of more than 5 percent over the existing budget figure would re-

[26] General Counsel Exh. 7.

[27] A mediator's role is to attempt to help and persuade the parties to reach agreement. Unlike an arbitrator or a court he cannot decide the issue or impose a settlement or a decision.

quire a vote of the people. The editorial, however, again endorsed mediation as a possibility offering hope of a "compromise or a reordering of priorities," that would resolve the dispute.

We do not purport to know all the salient facts in the school dispute and we would not express an opinion on them in any event. The position of the Respondent, whether pro school board, or pro teachers or pro public or whatever, does not concern us. Respondent, at no time prior to her writing the proposed editorial, indicated to Wood that its position was that the school board's position was more tenable than that of the teachers and that this should be indicated or stated in the editorial. Indeed, Wood's immediate supervisor, Pearson, had approved her editorial. It is a dubious proposition that Wood should have known that Respondent desired a tilt in the direction of the school board's position. There was probably a great deal to be said on each side of the contending parties. Wood's editorial did not assay the merits of the dispute since she was sponsoring the theme of mediation. Generally, if, for instance, the Government, or a citizens' group, or a newspaper, is going to urge mediation of a dispute, say, between the Longshoremen's Union and the Shipowners, it as the sponsor, does not in the same breath indicate that it believes that one party to the dispute has the more tenable position. Even a party disposed toward mediation may have some second thoughts if, in sponsoring the mediation, the sponsor has expressed an opinion on the merits unfavorable to the aforesaid party. Moreover, even after Colburn rejected Wood's editorial, he gave no clear indication of what he wanted in the editorial or whether he wanted the editorial to be down the middle or in one rather than in another direction. Such directive as he gave, i.e., to talk to Darrell Kellogg,

was carried through by Wood. In any event, we do not perceive in this episode of the school editorial, evidence of Wood's bias on labor matters or evidence of incompetence as a professional writer. More importantly, we have difficulty in believing that a person of Colburn's intelligence and experience in the newspaper field believed that, despite his failure to approve Wood's editorial, the proposed school editorial showed that Wood was incapable of writing professionally and without bias on labor matters.

Around August 5, 1971, Wood and some other women in the community met together on two occasions. Their purpose was to form a women's political caucus. They invited women in the community to join the movement or organization. On August 10 or 11, the Political Caucus of Wichita Women was organized and temporary officers were elected. Wood was elected coordinator, equivalent to chairwoman. An executive committee was also selected. On the committee were women who were, respectively, teachers, writers, computer programmers, production manager for a printing and advertising company, a former chairman (woman) of the Governor's Commission on the Status of Women, and a member of the Wichita board of education.

A story describing the formation of the Women's Caucus appeared in the Respondent's Eagle on August 11, 1971. It was written under the byline of Respondent's Women's News Editor, Diane Lewis. As described, the organization sought to have women elected to public office and have them involved "in the mainstream of Wichita and Kansas politics" and to bring women's interests to the attention of present elected officials. Represented were women from the Democratic and Republican parties as well as Independents. "Dorothy Wood, editorial writer for the

Wichita Eagle and the Beacon was named coordinator of the group." Wood was quoted as stating:

> We have become very concerned that although Kansas women have been franchised for more than 50 years, very few women have been elected to responsible offices or hold high posts within the political organizations. This hampers all of society because 53 percent of the population—women—is not adequately represented.

Also, on August 10 or 11, Wood was interviewed briefly for one or two minutes on a 6 o'clock news type of television show. Wood explained what the Women's Caucus was and what its goals were. She had been introduced as the coordinator of the Caucus and, apparently, as is customary on such programs, she was asked what her occupation was. The answer of course was that she was an editorial writer with the Eagle and Beacon.[28]

Neither with respect to the newspaper story about the Caucus nor in the brief television news interview, had Wood written any press release or script. No

[28] About a month before the actual formation of the Caucus, Respondent's Beacon had published an editorial entitled, "Women's Caucus." The editorial was written by Wood. The editorial described a meeting of the National Women's Political Caucus and its goals, as well as a suggestion from that organization that local women in Wichita and elsewhere form their own caucuses. The editorial then spoke of the desirability of Kansas women becoming interested in assuming a more active and prominent role in politics and thus correct the imbalance in their political status. The editorial was completely supportive of the idea of a Women's Political Caucus and with particular focus on the participation of Kansas women in active and responsible political roles. Colburn testified that he does not take issue with what the Women's Political Caucus stands for and that he subscribes to many of its ideals and policies. In fact, there is no claim or evidence that Colburn or Respondent was opposed to any of the goals or methods of the Caucus.

effort was made to convey and no impression was conveyed, in our opinion, that Wood, and the other women officers and committeewomen were participating in the Caucus as official representatives of their employers. They were participating as individual women and came from all political parties and a variety of occupations. The teachers' participation, for instance, did not indicate that the city of Wichita was sponsoring or was officially identified with the Caucus. Wood and the other women officials were all identified by name and occupation since such information is part of normal identification and description in a newspaper or television presentation. If Wood had been held up and robbed in downtown Wichita, the news story, in print and on the air, would no doubt state that last night, at the corner of X and Y streets, Dorothy Wood, an editorial writer of the Eagle and Beacon, was held up and robbed.

At no time after the August 11 newspaper report or story about the Women's Political Caucus or after the television news interview thereon, did Respondent receive mail or oral expression from its readers indicating disapproval of the fact that one of its editorial employees, Wood, was coordinator of the Wichita Women's Political Caucus.[29]

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[29] In the Examiner's opinion, if the average citizen and newspaper reader and television viewer learned or was told that this or that woman writer, reporter, photographer, doctor, lawyer, saleswoman, secretary, was active and prominent in a movement for women's rights and equality in the political field, he or she would be neither surprised nor concerned. By the same token, there would be an equal lack of surprise and concern if it was learned that this or that woman writer, saleswoman, or whatever, was not a member of or not active and prominent in a woman's rights organization.

On August 16, 1971, Wood was summoned to Colburn's office.[30] When she presented herself, Colburn said that he had something that was going to upset her and he preferred that she simply read it and then they would discuss it later. He handed her a letter or memorandum addressed to Wood from Colburn. She read this memorandum:

> As you are aware, the Company has had a long-standing practice that employees considering any type of outside work must consult their department head to make sure there is no possible conflict of interest or that their position with the paper is not exploited by other groups. On August 11, we carried a news story reporting that you had become coordinator of A Political Caucus of Wichita Women. Similar reports were carried on radio and television and you made at least one television appearance.
>
> Charles Pearson advises me that he was not consulted as to your accepting such a position nor was I consulted in his absence. This is a violation of company policy. Further, your leadership in such a movement diminishes *further* your value and performance as a member of the Eagle-Beacon editorial staff. Your present involvement with the *Wichita Newspaper Guild* has made it necessary to prohibit your writing editorial commentary on labor matters. (underscoring supplied).
>
> Your leadership role in the Political Caucus is a conflict of interest because you have been publicly identified as an editorial writer and the public can question the credibility of the newspapers as to any comment we may make, regardless of the merits of the program outlined by the caucus or any future caucus projects that cannot be forseen at this time. This is

[30] Pearson was on vacation in Minnesota during the entire month of August.

possible, even though you have no hand in the commentary.

Therefore, because of the restrictions we must impose on the subjects you can handle for editorial comment and because of the limitations of the size of the editorial page staff, effective August 23 you are being transferred temporarily to the Sunday department with no change in salary and with comparable working hours until the executive editor works out a regular assignment for you.

After making reference to the newspaper and television publicity on the Women's Caucus and her role therein, Wood asked Colburn why he had not said anything to her before about the matter. He said that he first had wanted to check with Pearson as to whether Wood had discussed the subject with him.[31] Wood than asked why Colburn had not told her that he objected to her being coordinator of the Caucus. He replied that she should have known how he felt about it. Wood said that if she had known how he felt and that he objected so strongly she might have considered resigning as coordinator. Colburn repeated that she should have known how he felt. He did not then give her the option of resignation and, as we shall see from his testimony, he at no time entertained the idea of affording Wood the option of resignation of her position in the Caucus.

Wood was transferred to the Sunday department where she served as editor of the Sunday Magazine and a Sunday TV supplement. Sparks, who had held the Sunday Magazine editorship until Wood's transfer, took her place in the editorial department.

Wood states that, when she was still in the editorial department, the fact that Sparks was not a

[31] Colburn had telephoned Pearson in Minnesota and, as was the fact, Pearson said that Wood had not consulted him.

member of the Union was made known to Pearson in the course of office conversation. Although Pearson denies knowledge of Sparks' status vis-a-vis the Union, Colburn did not testify on this aspect. In our opinion, it is highly improbable that Colburn transferred Sparks to the editorial department without being aware of and considering his union status. Respondent and Colburn have consistently held the view that editorial writers were part of management and should not be in the Union. As the evidence shows, and as confirmed by Colburn's letter to Wood on August 16, 1971, her "involvement with the Wichita Newspaper Guild" was considered a major disability in her employment as an editorial writer and was at least one of two major factors in her removal from that position. Under such circumstances, it strains credulity to believe that Sparks' membership or nonmembership in the Union was not known, or ascertained and considered before he was appointed as an editorial writer in place of Wood.

Wood's duties as editor in the Sunday department were more or less mechanical and involved little, if any, creative writing. She handled copy, wrote headings, saw to the page layout and makeup, and assigned some articles. At some later point the Sunday Magazine was discontinued and combined with a section called "Modern Living." Wood wrote half of Modern Living. She no longer edits TV week but, since February 1972, she writes a television column. She also edits the entertainment section for the Friday edition of the Beacon. Wood testified that she considered her transfer to be a demotion despite the fact that her salary remained the same. The principal reason why she felt this way was her interest in creative writing. Although management scrutinized and cleared the work of the editorial writers, Wood regarded the work as

basically creative and certainly more so than in the position to which she was transferred.

Colburn testified that Wood's transfer "was based on the diminution of her talents as an editorial writer because of her involvement in outside activities."

> Q. And what was the outside activity?
> A. One was the outside activity dealing as a labor negotiator; two, coordinator of the Women's Caucus.

The Act which governs this proceeding does not as such protect activities other than employees' union and concerted activities for the purpose of collective bargaining or other mutual aid or protection.[32] Consequently, if the only facts in this case were that an employee named Wood was transferred from her job because of activities or role in the Women's Political Caucus, the matter would not be cognizable under the Act. But such is not the instant case. If we accept the above-quoted explanation for Wood's transfer as testified to by Colburn, one of the two reasons for Respondent's action was Wood's union activities. Discrimination against an employee for such a reason is illegal and a violation of Section 8(a)(3) and (1) of the Act. This is true, if, in addition to the illegal reason, the discrimination is also due to another reason or two reasons, only one of which is proscribed by the Act.[33]

But, Respondent apparently argues, Wood's union activity is not protected by the Act because she was

[32] Section 7 of the Act.

[33] "Even though part of the motivation for Weber's discharge might have been a needed cutting of expenses, such circumstances could not be legally used to effectuate a companion motive to rid the company of a union protagonist." (citations omitted) *N.L.R.B.* v. *West Side Carpet Cleaning Co.*, 329 F.2d 758, 761 (C.A. 6).

"We have repeatedly held 'that if the discharge is because of union activity it is a violation of the Act even though a valid

not simply a member of the Union but was also on the Union's negotiating committee and on its executive board. The Act, however, does not make the distinction that Respondent seeks to make. In our opinion, the Act protects the right of an employee not only to join a union but to assume an active role therein. This includes the protected right to serve on union committees whether the committees are contract negotiating committees, grievance committees of whatever: although Wood was not a union officer, an employee has the protected right to be an officer in the Union. At such time as an employee becomes a paid employee of a union, (or any other employer) e.g., if Wood had become a full (or part) time paid representative or business agent of the Union, she would be an employee of the Union. Her original employer would no longer be obliged to retain her as an employee and her employee rights under the Act would relate to her union employer.[34]

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ground for dismissal might exist'" (citations omitted). *N.L.R.B.* v. *Longhorn Transfer Service*, 346 F.2d 1003, 1006 (C.A. 5). See also *N.L.R.B.* v. *Nachman Corp.*, 337 F.2d 421, 423–4 (C.A. 7).

[34] There are a number of cases where unions, as employers, have been involved in NLRB cases where their employees charged them with unfair labor practices In *Retail Clerks International Association, AFL–CIO* v. *N.L.R.B.*, 360 F.2d 642 (C.A.D.C.) Cert. denied 386 U.S. 1017, the full time paid International Representatives of the Union had joined another union in their status of employees of the International Union. Among other grounds, their employer (the Union) vigorously contended that the representatives were managerial people and not employees. In support of this position it was pointed out that the International Representatives were the agents of their employer, the Union, and that the relationship was not only confidential but possessed certain internal political aspects in addition to the managerial role of International Representatives in dealing with the local unions and in dealing with employers. The Board and the Court rejected these contentions and held that the representatives were employees under the Act.

Respondent then contends that while one of the two reasons for Wood's transfer was her union activity, Respondent's action was due to the fact that such union activity impaired and undermined both her status and her usefulness as an editorial writer. The record reveals the factors used by Respondent in producing this proposition.

In the representation case and in the instant case, Respondent's consistently held proposition and premise is that editorial page writers such as Wood are part of management and are not employees. From such a premise it follows, as Respondent saw it and does now contend, that editorial writers, since they are management people, cannot and should not engage in union activities or be in a union, because they cannot perform their management role since their ability, effectiveness and integrity as management people writers is destroyed by their union association and activity.[35]

The difficulty with the foregoing is that the all important premise is without support. The Board has found, after litigation of the issue, that editorial writers are employees and Wood, as an editorial writer, is an employee in the bargaining unit and is protected by the Act's provisions. Further, the evidence in the instant case, in our opinion, fully confirms that the editorial writers are employees.

While some employers have believed and others have asserted the belief that an employee's affiliation with or activity in a union impairs his loyalty, effectiveness, productivity, integrity and so forth, such

[35] Wood was not an employee of the Union. In important respects, the Union is the agent of the employees. It becomes the collective-bargaining *agent* of the latter by the choice or vote of the latter. By a similar process a union can be decertified by the employees and thus lose its status as bargaining agent.

beliefs cannot negate the policies and provisions of the Act. An employer's fiat of belief cannot change an employee into a part of management or remove the employee from the Act's protection.

On the sole basis of the legally untenable premise and the syllogistic type reasoning flowing therefrom and described in the second paragraph above, Respondent decided that, because Wood was a union member and a union committeewoman, her effectiveness and integrity as an editorial writer was impaired. Without any evidence that Wood, as an admittedly competent professional editorial writer, had not, or would not, or could not, write, as directed, editorials expressing management's views, Respondent, after discontinuing all full scale editorial conferences for the quite apparent reason that it was displeased that Wood was a union member and activist, then barred Wood from writing any editorials on labor subjects. Respondent now asserts that since Wood's effectiveness and integrity as an editorial writer was thus impaired by Respondent's fiat, this impairment was one of the reasons for her transfer.

In important respects Respondent's position and contentions in this case have been dealt with before. Thus, in *A. S. Abell Co.*, 81 NLRB 82, the Board stated:

> The Employer states that it has carefully selected and instructed its editorial writers, and that it insists that they keep themselves free from outside commitments which might impair their judgment or divide their loyalties. It contends that to ask such men to participate in a union election is to ask them to compromise themselves, to yield part of their loyalty to an outside organization. The Board rejects this contention. We cannot subscribe to the sug-

gestion that participation in a union election or membership in a labor organization "compromises" integrity or freedom of thought. The Supreme Court dismissed a similar argument, saying:

"The order of the Board in nowise circumscribes the full freedom and liberty of the Petitioner to publish the news as it desires it published or to enforce policies of its own choosing . . . and . . . to discharge . . . any editorial employee who fails to comply with the policies it may adopt." (*Associated Press* v. *N.L.R.B.*, 301 U.S. 103)

The above cited *Associated Press* case covers many matters raised by Respondent in the instant case.

In the preceding paragraphs, we have accepted, *arguendo*, Respondent's contention that Wood's activities in the Union and her activities in the Women's Caucus were the two reasons why her ability and effectiveness as an editorial writer were impaired and thus led to her transfer. In that context, we have concluded that Respondent's position is legally untenable for the reasons cited above. We find that Respondent has violated Section 8(a) (1) and (3) of the Act by its transfer of Wood from the editorial department.

An additional approach to the issues in this case is afforded by the fact that the evidence casts doubt on the authenticity of Respondent's contention that Wood's activities in the Women's Caucus was one of the two causes of her transfer. There is substantial indication that Wood's union activities were the basic reason for the transfer and that her Caucus activities were pretextually added as a reason so that the transfer might not appear to be based solely on her union activities.

After Wood joined the Union and informed her supervisor, Pearson, of the fact, he warned her as a friend that Respondent's reaction might be severe. When, thereafter, Wood became active in the Union, Respondent discontinued its customary full editorial conferences. Pearson, at that juncture, told Wood that the situation was due to Respondent's anger at her union activity. Next, Respondent barred Wood from writing on labor subjects.[36]

Although Respondent had published an editorial favorable to the idea and objective of the Women's Caucus, it later cited failure to secure prior clearance from Respondent before becoming active in that organization as a reason for her transfer. Respondent in its letter notifying Wood of her transfer stated that on the Women's Caucus matter she had violated Company rules and policy. But a reading of Company rules as to outside activities, as set forth earlier in our Decision, persuades the Examiner that Wood violated no company rule on the subject of employee conduct generally or on employee engagement in outside activity. As to policy and practice, we have earlier described the variety and types of outside activities in which Wood and others had engaged in previously. In some instance prior clearance had been secured from Respondent and, in other instances, not.

[36] Respondent cites the fact that in the period after Wood became a union member she received a pay raise and had also been allowed to attend a union conference in Chicago. Both of these events occurred in 1970 before the Union was certified and before Respondent was faced with the actuality of having to recognize the Union. This was also before Wood was elected a committeewoman in the Union. The pay raise of $25, raising her salary to $225, was in August 1970, pursuant to a regular periodic review of performance of Wood in August. Since Respondent had no fault to find with her work, it presumably had no reason to deny her a periodic raise at that time.

Regarding those outside activities of which Respondent had disapproved, the maximum action taken by Respondent was to afford the employee or individual the option of resigning from the outside activity if he wished to remain in Respondent's employ. Thus, a former editor of the editorial page who was a member of the board of the Urban League was told to resign from the League or cease to be in Respondent's employ.[37] Seven of Respondent's reporters were involved in writing an extremely strong and bare knuckle attack upon newspapers in general and upon Respondent, its departments, and its editors, specifically. The article, described above in some detail, appeared in the Central Standard Times and its substance was that newspapers generally and Respondent, as a fairly typical example, were flagrantly venal and corrupt. If venality and corruption are not the worst accusations that can be made against a free press in a democratic country, the Examiner must plead ignorance of greater sins. But even in this instance, and in every other instance where Respondent disapproved of outside activities, it took no greater action than to require the 7 reporters to resign either from the outside Standard Times or from Respondent. Wood was the only employee who was not afforded the option of resigning from the disapproved outside activity (in this case, coordinator of the Women's Caucus) as the price of continuing in the job of editorial writer that she then occupied with Respondent. Nor had Colburn

[37] Although it is of minor importance, Wood testified credibly and without contravention that she was unaware that the former editor was a member of the Urban League or that Respondent had told him to resign therefrom if he wished to remain with Respondent.

ever entertained the idea of offering Wood the option of resigning as coordinator of the Caucus.[38]

The most reasonable, if not the only apparent, explanation, in Respondent's failure to tell Wood that she had the option of resigning as coordinator if she wished to continue as an editorial writer, was that Respondent was so intent on removing Wood from the editorial department because of her union status that it did not wish to give her an option or an "out" regarding the Caucus. In short, if Respondent had given Wood the option of resigning as coordinator of the Caucus and she did resign, she would still be in the editorial department. And, as contrasted with Wood's role in the caucus, Respondent could not legally give Wood the option of resigning her union role or of forfeiting her job. Her union role, being protected under the Act, was not one that she need forsake as the price of continued employment by Respondent. In this situation, therefore, in order to use Wood's role in the Caucus as an ostensibly legitimate reason, unconnected with union activities, for transferring her, Respondent avoided affording Wood the opportunity to resign as coordinator of the Caucus. Resignation would have left Respondent with only one arrow in its bow and that arrow was union activities, a risky course because of the protection of the Act.

It is the Examiner's opinion, therefore, that the evidence supports either of the following conclusions and in either case Respondent's action violated Section 8(a)(1) and (3) of the Act: Respondent transferred

[38] "A. [Colburn] . . . It came to me later that she could have resigned if I had brought that question up.

Q. Well, if she had said it [I will resign as coordinator] right then, what effect would that have been?

A. None.

Q. You had already made up your mind?

A. Yes: there was nothing else I could do.

Wood because of her union activities and her Caucus activities; Respondent transferred Wood because of her union activities; and the Caucus activities, from which she could have been asked to resign but on which she was not given the opportunity to do so, were used to color and diffuse the basic motivation against her union activities.

Statements of Pearson to Wood to the effect that consequences to her were likely to be severe because she had become a union member and that she should be prepared for any consequences since management was angry about her union activities are found to be violative of Section 8(a)(1) of the Act. [While] it is true that Pearson spoke as a friend and wished to help Wood by speaking to her along the above lines, the statements conveyed a threat and thus constituted interference, restraint, and coercion of an employee in the exercise of her statutory rights to join a union and to engage in union activity. The impact of the statements, coming as they did from a friend who was part of management, was probably greater in view of the authenticity and credibility of the source.

Conclusions of Law

Respondent has violated Section 8(a)(3) and (1) of the Act by transferring employee Dorothy Wood, against her will, from the editorial page department to the Sunday Magazine department because of the said Wood's union activities.

Respondent has violated Section 8(a)(1) of the Act by telling employee Wood that consequences of her union membership and activity might be severe because management was angry about her aforesaid membership and activity.

The Remedy

Having found that Respondent has violated the Act, it will be recommended that Respondent cease and desist therefrom and take appropriate remedial action to remedy its unfair labor practices.

Accordingly, Wood should be offered her former job as a writer in the editorial page department, displacing, if necessary, any present incumbent in her former job. She should receive, upon restoration to her former job, her former salary at the time of her transfer on August 16, 1971, plus any increase she would have received, absent her transfer, since her last pay increase in August, 1970, to the time of the offer of reinstatement.[39]

Upon reinstatement to her former job Wood will enjoy the status of any other writer in the editorial page department without discrimination because of her union membership or activity. By the same token, Wood will be subject to the same lawful standards and requirements that Respondent, as an employer, applies or may apply to its employees. Inability or unwillingness of any employee to perform as lawfully required by his or her employer subjects the employee to the employer's full power as an employer.

Recommended Order[40]

Wichita Eagle & Beacon Publishing Co., Inc., its officers, agents, successors, and assigns, shall:

[39] August 1971 was the periodic time for Respondent's review of Wood's salary. Before leaving on vacation for the month of August 1971, Pearson, Wood's immediate supervisor, had written a memorandum to Colburn. Therein he reminded Colburn that it was time for review of Wood's salary and that Pearson recommended an increase for Wood.

[40] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended

1. Cease and desist from:

(a) Discouraging membership and activity in the Wichita Newspaper Guild, affiliated with the Newspaper Guild, AFL–CIO, or in any other labor organization, by transferring employee Dorothy Wood from her position as a writer in the editorial page department because of her union membership and activities.

(b) Interfering with, restraining, or coercing Dorothy Wood or any other employee by statements that consequences to Wood could be severe because of her union membership and activities in view of management's anger because of such membership and activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to Dorothy Wood immediate and full reinstatement to her former job, without prejudice to her seniority and other rights and privileges and make her whole, with interest at 6 percent, for any loss of pay increases that she would have received absent her discriminatory transfer on or about August 16, 1971, as more fully described in the Remedy section of this Decision.

(b) Post at the office or offices of its newspapers in Wichita, Kansas, copies of the attached notice marked "Appendix."[41] Copies of said notice, on forms pro-

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Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[41] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read

vided by the Regional Director, Region 17 of the Board, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other material.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze the amount of backpay raises, if any, that Wood would have received absent her discriminatory transfer in August, 1971, including payroll records and personnel memoranda and records.

(d) Notify the Regional Director, Region 17, in writing, within 20 days from receipt of this Decision, what steps have been taken to comply herewith.[42]

Dated at Washington, D.C.

RAMEY DONOVAN,
Trial Examiner.

"POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[42] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

Notice to Employees

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD—AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial in which all parties participated and were represented by attorneys, it has been found that we have violated the National Labor Relations Act in certain respects. To remedy these violations, we advise you that:

WE WILL NOT discourage membership and activity in the Wichita Newspaper Guild, affiliated with the Newspaper Guild, AFL–CIO, or in any other labor organization by transferring employee Dorothy Wood from her position as a writer in the editorial page department because of her union membership and activity.

WE WILL offer Dorothy Wood immediate reinstatement to her former position as a writer in the editorial page department and WE WILL pay her any wage increases that she would have received in that position if she had not been transferred in August 1971.

WE WILL NOT interfere with, restrain, or coerce Dorothy Wood or any other employee by statements to Wood that consequences could be severe because of her union membership and activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exer-

cise of rights guaranteed by Section 7 of the National Labor Relations Act.

WICHITA EAGLE & BEACON
PUBLISHING CO., INC.,
(Employer)

By _____
(Representative) (Title)

Dated _____.

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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-701 and 73-708

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.,
Respondents.

THE NEWSPAPER GUILD
Petitioner,
vs.
WICHITA EAGLE & BEACON PUBLISHING CO., INC.,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement 4

Argument—

I. The Circuit Court's Holding That the Board Has No Jurisdiction Over Respondent Paper's Editorial Staff Is Clearly Correct, Does Not Conflict with Decisions of This Court or of Other Courts, and Presents No Important Question of Law Meriting Review 8

II. The Circuit Court's Determination That the Order of the Board Was Not Supported by Substantial Evidence Was Clearly Correct and Was Not a Departure from the Course of Accepted and Usual Judicial Proceedings 11

Conclusion 12

Certificate of Service 13

Table of Authorities

CASES

Associated Press v. *N.L.R.B.*, 301 U.S. 103 9

Bell Aerospace Company Division of Tepton, Inc. v. *N.L.R.B.*, 2 Cir., 475 F.2d 485 (1973), cert. granted Oct. 9, 1973, No. 72-1593 ..... 11, 12

Griffin v. *California*, 380 U.S. 609 12

Lemon v. *Kurtzman*, 403 U.S. 602 9

N.A.A.C.P. v. *Alabama*, 357 U.S. 449 8
Near v. *Minnesota*, 283 U.S. 697 8
New York Times Co. v. *Sullivan*, 376 U.S. 254 8-9
New York Times Co. v. *United States*, 403 U.S. 713 9
Pittsburgh Press Co. v. *Pittsburgh Human Relations Comm.*, ... U.S. ....., 37 L.Ed. 2d 669 11
Schneider v. *Irvington*, 308 U.S. 147 8
Smith v. *California*, 361 U.S. 147 12
Speiser v. *Mandall*, 357 U.S. 513 9
Talley v. *California*, 362 U.S. 60 8
United States v. *Rumely*, 345 U.S. 41 10

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—
Article I, Section VIII 2, 11
First Amendment 2, 8, 9, 12
Fourth Amendment 3, 8
Fifth Amendment 3, 8, 12
Ninth Amendment 3, 8

National Labor Relations Act (29 U.S.C. Sec. 151, et seq.)—
Section 1 3
Section 2 3
Section 8(c) 3, 12
Section 10(a) 4

28 U.S.C. § 1254(1) 2

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitions, App. A) is reported at 480 F.2d 52. The Decision and Order of the National Labor Relations Board (Board Pet., App. C) is reported at 199 N.L.R.B. No. 50.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted the National Labor Relations Act as not conferring jurisdiction upon the National Labor Relations Board over newspaper editorial writers who intimately participate in the formulation and expression of the position of the newspaper's management and owners regarding all issues deemed to be of public importance.

2. Whether the order of the Board directing the respondent newspaper to transfer one of its news department employees to her former position as an editorial writer, is supported by substantial evidence on the record considered as a whole.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the United States Constitution are as follows:

Article I, Section VIII:

> "The Congress shall have power . . . to regulate commerce. . . ."

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . ."

Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The pertinent provisions of the National Labor Relations Act (29 U.S.C. Sec. 151, *et seq.*) are as follows:

Section 1:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce. . . ."

Section 2:

> "(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication. . . ."

Section 8(c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if

> such expression contains no threat of reprisal or force or promise of benefit."

Section 10(a):

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce."

STATEMENT

Respondent publishes a newspaper in Wichita, Kansas. Appearing daily on the editorial page of respondent's paper are a few paragraphs which state the views and opinions of the management and owners of the paper on topics of current public interest. (A. 24-5)[1] During the time period material, five persons were involved in the process of initiating, discussing and writing the paper's editorials. These five were the publisher, the president (who was also one of respondent's owners), and three writers, one of whom, Charles Pearson, was the editor of the editorial page. The other two writers were Dorothy Wood and Ted Blankenship. (A. 214-17)

Although the editorial staff members were included in respondent's news department, and while such departments are, in the newspaper industry, also commonly referred to as the editorial department, or as the news and editorial department, the offices of the three editorial writers were located next to the president's office, separated by considerable distance from the newsroom and from the employees actually engaged in the gathering and reporting of news. (A. 20-21, 95, 222) The editorial writers would normally meet daily with the publisher for formal

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1. "A." refers to the printed Appendix prepared for the Court of Appeals.

editorial conferences and, due to the proximity of their offices, would usually informally carry on discussions throughout the day with one another and with the president, concerning editorial content. (A. 26, 154, 181, 185, 218, 221-22)

During these conferences and discussions, any of the participants might suggest topics for consideration. A free exchange of ideas and viewpoints would take place, with each participant arguing for his subjective viewpoint as the appropriate one to be printed as the opinion of the paper's management and owners. (A. 95-96, 220) Unless both were absent, the editorial drafts were subject to revision or rejection by Pearson and the publisher. (A. 29)

Petitioner, the Newspaper Guild, organized respondent's news department during the spring and summer of 1970. (A.215) At the representation hearing before the regional director and also before the Board, petitioner objected to the inclusion of its editorial writers in the bargaining unit and to the jurisdiction of the Board over them. (A. 183-193) Pearson was excluded as a supervisor, but Wood and Blankenship were included in the unit over petitioner's objections that its freedoms under the First, Fourth, Fifth and Ninth Amendments would be infringed by the Board's assumption of jurisdiction over its editorial staff and that editorial writers have the characteristics of managerial or confidential employees. (A. 182, 183-93)

In January of 1971 the Wichita local of the Newspaper Guild was certified as the bargaining agent for the newsroom employees and for the two editorial writers. Shortly thereafter, Wood was elected as an officer of the union and as a member of its negotiating team. The publisher then denied Wood further permission to write editorials on labor-management issues. (A. 230-32) In August of 1971, Wood was elected to leadership of the Women's Politi-

cal Caucus, and invited the communications media to a charter meeting. On that occasion, she was identified on television and in the press as one of respondent's editorial writers. (A. 49-51, 236-37) The publisher then transferred her to a position in the newsroom with the same rate of pay, giving as the reasons for the transfer her diminished usefulness to the paper as an editorial writer, attributable to her public identification as a union official and as head of the Women's Political Caucus. (A. 239-40)

An unfair labor practice charge was filed with the Board on Wood's behalf. Following the hearing thereon, the trial examiner found that the publisher's claim that Wood's usefulness as an editorial writer had been diminished was a mere pretext, and that union animus was the underlying motive for her transfer. (A. 246) He reached this conclusion largely on the basis of the constitutional objections lodged by respondent in its brief in the representation proceeding and renewed at the unfair labor practice hearing, upon his interrogation and that of Board counsel regarding the paper's editorial policies and practices, upon testimony concerning the political leanings of the paper and the organizations to which its management belonged, and upon an analysis of certain of respondent's editorials measured by the trial examiner's standards for editorial writing. (A. 69-70, 102, 110-111, 121, 244, 234-36, 247-48) He recommended Wood's reinstatement as one of respondent's editorial writers. (A. 250-51) Respondent filed its exceptions thereto. The Board adopted, without comment, the trial examiner's recommended decision and order. (A. 255-60)

Upon respondent's petition for review and the Board's petition for enforcement of the order, the Court of Appeals for the Tenth Circuit refused to enforce the Board's order, holding that Wood was a managerial employee, that to

conclude otherwise would infringe respondent's constitutional freedoms, and that the order was without supporting substantial evidence on the record considered as a whole. (Board Pet., App. A) Thereafter, the Newspaper Guild was permitted to intervene, and both it and the Board filed with this Court their petitions for a writ of certiorari.

ARGUMENT

I

The Circuit Court's Holding That the Board Had No Jurisdiction Over Respondent Paper's Editorial Staff Is Clearly Correct, Does Not Conflict with Decisions of This Court or of Other Courts, and Presents No Important Question of Law Meriting Review.

The Court below was faced with a record burdened with violations of fundamental rights protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution, all of which violations resulted from the Board's assumption of jurisdiction over the paper's editorial staff and its investigation of the motive prompting Wood's transfer. By intruding directly upon the paper's editorial conferences and standards, and by probing into the thoughts, beliefs, attitudes and affiliations of its owners and management, the Board ignored the clear pronouncements of this Court as to:

Freedom of association and privacy in association. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449;

Forced disclosure of authorship of protected publications. *Talley* v. *California*, 362 U.S. 60;

The limits upon governmental regulations for public convenience when such regulations conflict with First Amendment rights. *Schneider* v. *Irvington*, 308 U.S. 147;

The Constitutional strictures against governmental activity which amounts to a prior restraint upon the press or a deterrent of speech or of the written word, which the Constitution makes free. *Near* v. *Minnesota*, 283 U.S. 697; *New York Times Co.* v. *Sul-*

livan, 376 U.S. 254; *Speiser* v. *Mandall*, 357 U.S. 513; *New York Times Co.* v. *United States*, 403 U.S. 713

The reinstatement of Wood to the paper's editorial staff would not only entail a continuing infringement of each of the foregoing protected activities, it would also require constant governmental surveillance of the paper's editorial processes in order to insure that Wood was included in all editorial conferences and that she was not discriminated against in the granting of editorial topics or in the editing of her submissions. Governmental policing of newspaper editorial conferences, of editorial assignments and of editorial composition is as clearly outlawed by the First Amendment as is government surveillance of religious affairs. *Lemon* v. *Kurtzman*, 403 U.S. 602.

Throughout the proceedings below, and in its petition to the Court, the Board has maintained steadfast silence as to the constitutional problems created by its assumption of jurisdiction over the paper's editorial processes and staff. The Guild, in its petition, maintains that this Court placed its stamp of approval upon the Board's conduct here by the decision in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, a representation proceeding in which the employer, a major news wire service, made no substantive record. Notwithstanding the surface confusion created by newspaper terminology, which sanctions the designation of newspaper copywriters as editorial employees, the facts in *Associated Press* have nothing to do with employees intimately and directly involved in the formulation and composition of newspaper editorial policies, as the Court below readily perceived.

> "*Associated Press* dealt not with a person who was actively engaged in the 'formulating, determining and effectuating' of the employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37 (7th Cir.); *Retail Clerks International Ass'n, AFL-*

CIO v. *NLRB*, 366 F.2d 642 (D.C. Cir.). Rather, that case dealt with a person who, although characterized as an 'editor' or 'editorial employee,' was employed '. . . to determine the news value of items received and speedily and accurately to rewrite the copy delivered to [him], so that the rewritten matter [should] be delivered to the various filing editors. . . responsible for its transmission, if appropriate, to the areas reached by their circuits.'

"Regardless of which appellation is given to the employee in *Associated Press*, whether it be 'editor,' 'editorial employee,' or a member of the 'news department,' his position was much more akin to that of the employees in the news department of the petitioning Wichita Eagle & Beacon Publishing Co., Inc., in the instant case than to that of Mrs. Wood. The hierarchy of personnel in Associated Press was such that the aggrieved employee was responsible, in turn, to a filing editor, various 'editorial employees,' 'supervising editors,' and an 'executive news editor' in the 'news department' of the Associated Press." (Board Pet., App. A, pp. 12-13)

There is no decision of this Court or any court which sanctions governmental regulation of a newspaper's editorial staff or investigation of its editorial policies and practices. As was its clear duty, *United States* v. *Rumely*, 345 U.S. 41, the Circuit Court construed the act so as to save it from such obvious constitutional infringement.

"To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper's management would come perilously close to infringing upon the newspaper's First Amendment guarantee of freedom of the press." (Board Pet., App. A, p. 14)

Surely, neither petitioner can sincerely expect this Court to overturn the holding below that an order compelling participation in a newspaper's editorial conferences and related editorial processes does ". . . infringe upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas." (Board Pet., App. A, p. 14) Alternatively, the decision of the Circuit Court is clearly supportable on the ground that editorials of a newspaper are strictly non-commercial in nature, and are not commerce within the meaning of Article I, Section VIII of the Constitution, nor commerce within the grant of power to the Board over labor disputes affecting commerce. *See, Pittsburgh Press Co. v. Pittsburgh Human Relations Comm.*, ... U.S. ....., 37 L.Ed. 2d 669.

The decision below does not rest upon the distinction between the Board's rule-making and adjudicatory processes when determining the proper definition of managerial employees, as in *Bell Aerospace Company Division of Tepton Inc. v. N.L.R.B.*, 2 Cir., 475 F.2d 485 (1973), cert. granted October 9, 1973, No. 72-1593. In view of the far more substantial constitutional considerations compelling the result below in the instant proceedings, the petition here should be promptly denied, regardless of the Court's disposition of the Bell case.

II

The Circuit Court's Determination That the Order of the Board Was Not Supported by Substantial Evidence Was Clearly Correct and Was Not a Departure from the Course of Accepted and Usual Judicial Proceedings.

The evidentiary foundation for the Board's order was provided by the illicit investigation conducted by the trial examiner and counsel for the Board concerning the paper's

editorial processes, editorial content, and editorial standards, as well as upon disclosures obtained concerning the organizational affiliations of its management, as aforesaid. In addition, the views expressed in the brief on behalf of the paper in the representation proceedings, and its legal position taken in the unfair labor practice proceedings, were used as evidence against the paper, notwithstanding the clear prohibitions of Section 8(c) of the Act, and notwithstanding the plain language of the First Amendment and the due process requirement of the Fifth Amendment. All such evidence was admitted and considered in direct disregard of Congressional and constitutional prohibitions. *Smith* v. *California*, 361 U.S. 147; *Griffin* v. *California*, 380 U.S. 609. A record consisting of such evidence cannot possibly provide substantial support for any affirmative order made thereon. The ruling below that the Board's order was without substantial support on the record considered as a whole was clearly correct. Only a contrary ruling would have merited the attention of this Court.

CONCLUSION

For the foregoing reasons the petitions herein for a writ of certiorari should be denied and without deferral of this cause to the Court's decision in No. 72-1598, *National Labor Relations Board* v. *Bell Aerospace Company*, certiorari granted October 9, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing Brief of Respondent in Opposition to Petitions for a Writ of Certiorari on all parties separately represented herein and on the Solicitor General pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States by depositing the same in a United States mailbox with first class postage or airmail postage, prepaid, addressed to counsel of record at the following addresses:

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